



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Case No. 25/2011

In the matter between

BANI ERNEST MASUKU

APPELLANT

and

**MAQBUL & BROTHERS INVESTMENTS
(PTY) LTD
SAFA INVESTMENTS (PTY) LTD
MARIO MASUKU
W.E. MASUKU INVESTMENTS (PTY) LTD
THE MASTER OF THE HIGH COURT
REGISTRAR OF THE HIGH COURT
THE ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT**

Neutral citation:

Bani Ernest Masuku v Maqbul & Brothers Investments
(Pty) Ltd & 6 Others (25/11) [2012] SZSC 68 (30
November 2012)

Coram:

M.M. RAMODIBEDI C.J., S.A. MOORE J.A., and
M.C.B. MAPHALALA J.A.

Heard:

19 NOVEMBER 2012

Delivered:

30 NOVEMBER 2012

Summary:

**Late filing of record of appeal – Application for
condonation refused – No sufficient cause shown –
Appeal deemed to have been abandoned – Costs to 1st
to 4th respondents.**

MOORE J.A.

[1] This is a hydra-headed litigation which is reaching this Court for the second time in some eighteen months. That so many related cases have been disposed of by so many judges in so short a time is to the credit of the workings of the Superior Courts of Swaziland where, as in this family of cases, matters move expeditiously from initiation to conclusion with commendable dispatch in a manner which has now become typical of the working of the Superior Courts in this Kingdom.

THE MULTIPLICITY OF CASES

[2] The appellant herein Mr. Bani Earnest Masuku has been involved in the following cases in which he was the aggressive but vanquished party:

- i. High Court – No. 3075/2010 – against Maqbul & Brothers Investment (Pty) Ltd and Others – Application dismissed. Judgment of Hlophe J for the Respondents.
- ii. Supreme Court – No. 55/2010 – against Maqbul & Brothers Investments (Pty) and Others – Appeal dismissed. Judgment of Farlam J.A. for the respondents.

- iii. High Court – No. 170 9/2011 against Maqbul & Brothers Investments (Pty) Ltd and Others. Application dismissed. Judgment of Stanly B. Maphalala for the respondents.
- iv. Supreme Court – No. 22 33/2011 against Maqbul & Brothers Investments (Pty) Ltd and Others. Application dismissed. Judgment of Ota J for the Respondents.
- v. Supreme Court – No. 25/2011 against Maqbul & Brothers Investments (Pty) Ltd and Others – The instant appeal.

THE APPEAL

[3] The appeal before us has not, uncharacteristically, put an end to the profusion of litigation in this affair. It must be observed that Mr. Bani Earnest Masuku appears to have an insatiable thirst for litigation and seems to be addicted to the allure of the court house: but it would appear that he seems to have lost sight of the fundamental principle that it is in the public interest of this Kingdom that there should be an end to litigation. His appeal is against the judgment of Principal Judge Maphalala delivered in open court on the 3rd June 2011. The concluding paragraph of that judgment reads:

“For the above reasons therefore I find that this matter is *res judicata* and the application is accordingly dismissed with costs.”

As the notice of appeal puts it:

“The finding of fact and/or rulings of law appealed against and the grounds upon which the appeal is founded are the following:

1. The learned judge erred in upholding the plea of *res judicata* as the ground of action in Appeal Case No. 55/2010 is different from the one that was advanced in High Court Case No. 1709/11. The application under the latter case was for an interdict pending the determination of the rights of the parties.
2. The learned Judge erred in upholding the plea of *res judicata* as the judgment in Appeal Case No. 55/2010 was not a final one as it did not adjudicate upon the issues between the parties.”

THE CHRONOLOGY OF EVENTS

[4] Counsel for both sides of this appeal very helpfully filed chronologies pertinent to this appeal. This court is grateful for this assistance as, at

a glance, the continuum of happenings leading up to where matters stand at the present moment can be readily observed. Rather than overlay the judgment of the court with these chronologies, I would instead, append them to the judgment as Annexures A and B being the chronologies of the appellant and the respondents respectively.

ABANDONMENT

- [5] On the 3rd June 2011 Principal Judge Stanley B. Maphalala delivered a written judgment in Case No. 1709/2011. He ordered that “this matter is *res judicata* and the application is accordingly dismissed with costs.” On the 6th June 2011 the appellant noted “an appeal against the judgment of his Lordship Principal judge Maphalala granted on the 3rd June, 2011 in which the learned judge dismissed the appellant’s application.” Under Rule 30 (1) and (4) of the Supreme Court Rules, the appellant ought to have submitted the record for certification no later than the 5th August 2012. The record of appeal, such as it is, bears the Registrar’s stamp dated the 31st August 2012 and was therefore out of time.

CONDONATION

[6] On 25th October 2012, the appellant filed a notice of motion seeking “condonation of failure to lodge record and heads of argument timeously.” The affidavit of Siboniso Clement Dlamini was annexed in support of the application. In that affidavit, experienced counsel who had carriage of the matter swore, in so far as is relevant:

- i. That it had only just – on the 25th October 2012 – come to his notice that the appeal record was not filed in time.
- ii. This was because “there is now a multiplicity of cases between these litigants and the paper work has become voluminous.”
- iii. The appellant is under severe financial hardship and has been finding it difficult to meet the costs of the appeal if at all.
- iv. The prospects of success of the appeal are good.
- v. The first and second respondents have come to court with dirty hands.
- vi. The notice requiring heads of argument to be filed by the 30 September 2012 appeared on the same day i.e. 30th September 2012.

vii. There was no undue delay in filing heads.

[7] The respondents' collective response to the spurious averments contained in Mr. Dlamini's affidavit is to the effect that the following factors advanced by Mr. Dlamini did not either individually or collectively, show sufficient cause for the grant of condonation:

- i. The appellant's attorney's mishandling of multiple cases.
- ii. The appellant's financial hardship.

They further contended that:

- i. The appellant had no prospects of success as the merits of the appeal are *res judicata*.
- ii. The appellant was himself late in filing his heads of argument.
- iii. The rules of the Supreme Court are mandatory and the appellant is not entitled to any condonation at the 11th hour.
- iv. The appellant, having filed the record out of time, the respondents are entitled to invoke the power of the Supreme Court to refuse the application for condonation, and to deem the appeal abandoned.

THE RULES OF THE SUPREME COURT

- [8] The rules of the Supreme Court have been designed to ensure the smooth, orderly and, most importantly, the timely and expeditious conduct of litigation. The timelines set down in the rules represent realistic periods within which a given step in litigation must be taken. These periods of time were not plucked out of the air. They were based upon years of experience of what can in all probability be achieved with diligence and dispatch in the absence of any unforeseen eventuality.
- [9] That is why, cognizant of the fact that perfection in human affairs is not always achievable, the rules themselves allow for the extension or enlargement of time in deserving cases. Accordingly this Court will exercise its facilitative discretion in favour of a litigant who is out of time for good and sufficient reason.
- [10] No system of rules, however, could indulgently countenance the degree of laxity and indolence exhibited by the appellant in this case; aggravated by the facile explanation advanced by Mr. S.C. Dlamini for his own inexcusable tardiness, and for his client's improvident

slothfulness. Furthermore, there is no evidence that, while protesting his lack of means, the appellant has taken any of the steps which were probably open to him under Rule 32 of the Rules of the Supreme Court.

CONCLUSION

[11] For all of the foregoing reasons, this appeal falls to be deemed to have been abandoned.

ORDER

- i. The appeal is hereby deemed to have been abandoned.
- ii. The appellant must pay the costs of 1st to 4th respondents.

S.A. MOORE
JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

M.C.B. MAPHALALA
JUSTICE OF APPEAL

For the Appellant : Mr. S.C. Dlamini
For the 1st and 2nd Respondents : Ms Boxshall Smith
For the 3rd and 4th Respondents : Mr. M.Z. Mkhwanazi